United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

Original

ORIGINAL

74-1181

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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P/S

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

JOSEPH RUBIN,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

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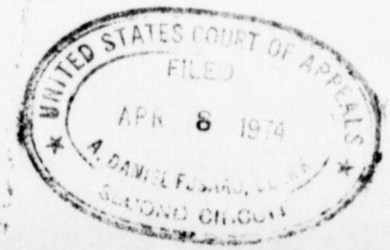

CONTENTS

TABLE OF AUTHORITIES

Cases: Page

OTHER AUTHORITIES:

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,	:	
Plaintiff-Appellee,	:	Docket No. 74-1181
-against-	:	
JOSEPH RUBIN,	:	
Defendant-Appellant.	:	

APPELLANT'S BRIEF

STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal from the conviction after trial by jury of defendant-appellant Joseph Rubin in the United States District Court for the Eastern District of New York for violation of 21 U.S.C. §846 for purportedly conspiring from March 20 to April 13, 1972 to "knowingly and intentionally" distribute quantities of cocaine hydrochloride, a schedule II narcotic drug controlled substance (21 U.S.C. §841).

B. The course of the proceedings and its disposition below

The indictment was returned on October 31, 1972. It consisted of three counts. The first count was the conspiracy count against defendant Rubin, Dennis Mayer and Mitchell Sorkin.* The second count charged Sorkin and Mayer with distributing a quantity of cocaine on March 21, 1972 (21 U.S.C. §841(a)(1)). The third count charged Mayer with distributing a quantity of cocaine on March 30, 1972.

Trial was commenced before the Hon. John R. Bartels, U.S.D.J., on December 26, 1972 and continued for four trial days. The jury returned its guilty verdict on January 3, 1973. On March 23 and March 30, 1973, respectively, Mayer and Rubin were each sentenced to serve 18 months. The notice of appeal was filed on April 6, 1973.

C. Statement of facts

1. The Government's Case Against Rubin

The indictment charged Rubin with one count of conspiring to "knowingly and intentionally" distribute

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* Rubin and Mayer were tried together without defendant Sorkin. Sorkin did not testify at their trial.

cocaine. In substance, the government attempted to prove its case against Rubin through the testimony of Federal undercover agents McElynn and Sheehan. Agent McElynn testified that after he had received samples of substances which contained cocaine from defendant Mayer, Mayer asked him to telephone defendant Rubin (Tr. at pp. 142-143). According to McElynn, Mayer informed him that he, Mayer, was going out of town for a few weeks, and that during his absence, Rubin would act for Mayer (Tr. at p.143).

McElynn further testified that he thereafter spoke to Rubin on the telephone on March 31, 1972, during which conversation it was agreed to meet at Rubin's apartment (Tr. at pp. 145-146). McElynn, Sheehan and Rubin thereafter met at Rubin's apartment* on the same day. McElynn testified that at this meeting Rubin delivered a sample of a substance to him which Rubin told him was cocaine (Tr. at p. 148). According to McElynn, Rubin said he wanted McElynn to tell him "how good it was" (Id.) Subsequent laboratory analysis by a Bureau of Narcotics and Dangerous Drugs chemist established that while the

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* Rubin's apartment was located in the Southern District of New York.

substance was for the most part procaine,* it contained a quantitatively unmeasurable amount of cocaine. According to the testimony of the government chemist, the sample itself was so small that it was not possible to determine the amount of cocaine it contained (Tr. at p. 48).

Agent McElynn's next and last contact with Rubin were two telephone conversations on April 3, 1972. During the second call, initiated by Rubin, Rubin advised McElynn that he would not have any further dealings with him (Tr. at p. 154). Agent Sheehan's testimony in substance confirmed the March 31 meeting with Rubin (Tr. at pp. 552-554).

2. Rubin's Defense

As noted above, appellant Rubin was named in only one count of the three count indictment. That count charged him with conspiring to knowingly and intentionally distribute quantities of cocaine hydrochloride in violation of 21 U.S.C. §841(a)(1). Rubin's defense was simply that although he had told Agent

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* According to the government chemist Weber, procaine, not a controlled narcotic, is a local anesthetic similar to cocaine (Tr. at p. 59). It produces the same result in a color test - blue - (commonly known as a field test) as cocaine (Tr. at p. 54). Novocain is a trademark brand name of procaine. 2 Schmidt, Attorneys' Dictionary of Medicine, 565 (1971)

McElynn on March 31 that the sample was cocaine, he believed it was procaine.

The evidence below was that for many years Rubin had been, and still is, a professional writer (Tr. at pp. 228-232). In 1971 and 1972 he was involved in several literary projects, including a book and TV project, concerning narcotics (Tr. at pp. 228-239). In attempting to research these projects he experienced great difficulty in securing first-hand knowledge of people actually involved in the drug traffic (Tr., at pp. 240-249). For this reason he arranged with co-defendant Mayer to obtain five small samples of a substance he, Rubin, thought was procaine and sugar, the distribution of which would not constitute a violation of law, but which would pass in the street as cocaine (Tr., at pp. 249-256). Through the use of these samples, Rubin hoped to pass himself off as a source of cocaine to cocaine pushers, and thereby obtain first-hand information for his various literary projects (Tr. at p. 249).

Defendants Mayer and Rubin pursuant to this plan secured the five samples of what Rubin thought were procaine and sugar from one Celine Oppenheim (Tr., at p. 251).

In Rubin's attempts to use what he thought was procaine as an entree to people in the narcotics trade, Rubin, on one occasion and one occasion only, March 31, 1972, gave a sample of the substance he thought was procaine and sugar to Agent McElynn, who had been introduced to him by Mayer (Tr., at pp. 249-250) and, who he, Rubin, thought was a drug dealer. The facts surrounding this delivery were established at trial by the government through agents McElynn and Sheehan as an overt act committed in connection with the alleged conspiracy.

In substance, therefore, Rubin's fate with the jury depended upon one crucial factor, i.e., whether or not the jury believed that Rubin was doing literary investigatory research on drugs. If he were not, he would have had no reason to be passing what he thought was procaine to the undercover agent. If, on the other hand, he was actually doing investigative research, there was a reasonable explanation as to why and how he could innocently deliver a sample containing a fragmentary amount of cocaine to the Agent McElynn.

As will be hereinafter demonstrated, the Court by its conduct precluded an objective evaluation of this defense by the jury. More significantly, appellant Rubin's explanation of his attempt to research the various

literary projects was repeatedly subjected to ridicule and implications of disbelief by the Court in front of the jury (see Point II, infra).

3. The Conflict of Interest and the April 17, 1972 Transcript

Up to the commencement of the trial both Rubin and Mayer were represented by Delavan Smith, Esq. On December 26, 1972, immediately after the clerk called the case, the Assistant U.S. Attorney brought a conflict of interest problem to the Court's attention (Tr. at p. 2). After Attorney Smith originally resisted separate representation for the defendants (Tr., at pp. 2, 4), he finally expressed a willingness to accept the appointment of additional counsel for defendant Mayer (Tr., at pp. 9-11). Accordingly, at the eve of trial, it was decided that Smith would continue to represent Rubin, and new counsel would represent Mayer.

One of the tools which Smith had to excise Rubin from the purported conspiracy was a government transcript, produced to the defense by the government, of a recorded telephone conversation between Mayer and Agent McElynn on April 17, 1972. As will hereinafter be seen (Point I, infra), that conversation in effect exculpated Rubin from the alleged conspiracy, and at the same time

effectively branded Mayer as a conspirator. Presumably torn between his allegiance to both men, Smith never attempted to use that transcript. Even though both McElynn and Mayer testified, Smith never cross-examined them about their April 17, 1972 conversation.

Since Attorney Smith represented Mayer up to the first day of the trial, he could not use the April 17 transcript. To have done so would have unquestionably incriminated Mayer and breached Smith's continuing duty of loyalty to his former client. Consequently, Rubin was deprived of the benefit of the exculpatory contents of the April 17 transcript. As a result, Smith was unable to effectively represent Rubin, who was thus deprived of his constitutional right to counsel.

THE ISSUES PRESENTED

1. Was defendant Rubin denied his Sixth Amendment right to the loyal and undivided assistance of counsel?

2. Did the conduct of the trial judge establish an atmosphere prejudicial to Rubin's right to a fair trial?

3. Was it reversible error for the trial court to charge that the jury could find that Rubin consciously elected to avoid knowledge of the contents of the sample?

POINT I

DEFENDANT RUBIN WAS DENIED HIS SIXTH AMENDMENT RIGHT TO THE LOYAL AND UNDIVIDED ASSISTANCE OF COUNSEL.

A. The April 17, 1972 Transcript

On April 17, 1972, shortly after returning from California, defendant Mayer telephoned Agent McElynn. This conversation was secretly recorded by Agent McElynn, and the government provided a transcript of the conversation (App., at pp. 99-111) to the defense. In this conversation, Agent McElynn described his meeting on March 31, 1972 with appellant Rubin and his subsequent telephone conversations with Rubin on April 3, 1972, which concluded with Rubin's statement to McElynn that he wanted nothing further to do with any cocaine transactions.

The April 17 conversation between Agent McElynn and Mayer corroborates appellant Rubin's defense that he was a writer attempting to obtain information about narcotics from actual narcotics dealers, and discredits Agent McElynn's trial testimony connecting Rubin with an alleged conspiracy to distribute cocaine. The transcript of this conversation is a singularly important piece of exculpatory evidence for Rubin. However,

because it contains proposals by Mayer of further sales of cocaine to Agent McElynn and Mayer's admissions of other illegal narcotics activities, the transcript is at the same time an extremely incriminating piece of evidence insofar as it concerns Mayer.

Rubin's attorney, Smith, made no effort to introduce this transcript into evidence, nor did he cross-examine Mayer or make use of the transcript in his relatively brief cross-examination of Agent McElynn (Tr., at pp. 158-173). Indeed, neither the prosecution nor the defense introduced this transcript into evidence or made any reference to this telephone conversation during the trial.

As the following excerpts from the transcript of the April 17 conversation between Agent McElynn and Mayer show, statements made by each corroborate Rubin's defense that he had little knowledge of and no actual experience with a narcotics transaction, and was seeking to induce Agent McElynn to deal with him in an effort to obtain information on this subject for his literary projects:

"Mayer: And so, you know, the guy [Rubin] just don't want to know from it, right.

McElynn: Who, Joe?

Mayer: Yeah

McElynn: Yeah

Mayer: He doesn't want to know, you know, and he was doing me a favor, so let's just forget him. All right, I just got back... (App., at pp. 99-100)

* * *

McElynn: What did he [Rubin] think, that the guy was gonna hurt him or what?

Mayer: Who knows, man. He didn't know anything about nothing. I didn't tell him anything. I told him 2 guys.

McElynn: Yeah, right.
(App., at p. 101)

* * *

McElynn: Hey, listen, apologize to Joe for me, uh, if, it appears that we've got him a little upset, so, uh, just tell him, explain to him the way Tom*is, I mean, you know, we didn't mean any harm to the guy.... You know what I mean. That's just the way that Tom is and if, you know, if he scared the guy, then I apologize, but uh...

Mayer: Well, see, the guy, the guy is a legitimate person.

---

* "Tom" was Agent Sheehan who accompanied Agent McElynn to Rubin's apartment on March 31.

McElynn: Un hum

Mayer: And he doesn't do things, he really doesn't

McElynn: Yeah (App., at pp. 109-110)

* * *

Mayer: And, uh, he's very affluent and he's a very good writer and he's also a lawyer.

McElynn: Yeah

Mayer: You know, and he, I don't know, who knows, you know, I mean the guy is freaked out of his head.

McElynn: The impression I got

Mayer: Right now

McElynn: The impression I got, why

Mayer: I don't know

McElynn: The impression I got from him though, like he was a stone amateur and didn't know what the [obscenity] was happening

Mayer: That's exactly what he is.

McElynn: You know, and like I was getting a little pissed while I was there because I could see it, like the guy just wasn't into anything."
(App., at pp. 110-111)(Emphasis added).

Obviously, this transcript would have been an extremely valuable piece of evidence exculpating Rubin. For example, if it had been used by Attorney Smith on cross-examining Agent McElynn, it would have effectively

discredited any contention that Rubin was part of a conspiracy to distribute cocaine. On the other hand, as the following excerpts from the April 17 conversation show, the transcript was also an extremely incriminating piece of potential evidence inculpating Mayer.

After explaining the demise of a proposed deal to purchase a large quantity of cocaine in Florida, part of which was to be sold to Agent McElynn, Mayer described his trip to California and his fear that he would be apprehended by Federal narcotics officers because of his narcotics dealings:

"Mayer: You know, but, uh, the only problem that I have is I have a funny feeling that uh, unless I'm just getting paranoid, which is possible, you know, uh, I have a feeling I'm being looked at from time to time and I just don't dig it, you know.

* * *

Mayer: Yep, and I noticed a blue Ford following me in L.A. Now you know, I might be crazy or cracking up or something, I was just

McElynn: Did you get the plate on it.

Mayer: No, I didn't

McElynn: You would have

Mayer: I ran, what are you joking?

McElynn: What the [obscenity] did you run for? You're not doing anything wrong

Mayer: Well, at the time I was.

McElynn: Oh " (App., at pp. 103-104)

Expressing fear of "a Federal program" of enforcement of the narcotics laws (App., at p. 105), Mayer then admitted that while not a "big" dealer, he does consider himself a narcotics dealer:

"McElynn: Yeah, but they're [Federal narcotics agents] looking for big people, let's face it.

Mayer: Well, I hope so because I ain't big.

McElynn: That's what I mean

Mayer: I don't ever want to get big. I would if I were you, I'd be careful, because you guys are pretty big, you know.

McElynn: No, I don't think so. I mean, compared to what's going down in the city, we're nothing.

Mayer: Uh hum

McElynn: I mean, really, I'm not even, you know, concerned about that because there's a lot of people doing a lot more than we are." (App., at p. 105)

Finally, Mayer offers to locate quantities of cocaine which Agent McElynn expressed an interest in purchasing:

"Mayer: You know, so that's where that's at, and now I gotta run around trying to find you something, is that the deal?

McElynn: Well, what do you mean, I don't know, there's you know

Mayer: Well, I'm gonna try

McElynn: Yeah (App., at pp. 101-102)

* * *

Mayer: Cause if you can get something, and you know, like I'm sure that..

McElynn: Well, what I would like to do, if you can set anything up, is, uh, like at least cop an eighth, because, uh, anything less wouldn't be worth it, you know.

Mayer: Uh hum

McElynn: And, uh, if you get like a good price, you know, you know what the prices are, so, uh, an eighth at a descent price will be fine
(App., at p. 108)

* * *

Mayer: Uh, what I might do sometime this week is to come out by you.

McElynn: O.K.

Mayer: You know, and sit down. Let me see if I can get something..."
(App., at p. 111)

Thus, while Rubin is characterized by Mayer and Agent McElynn in their April 17 conversation as a "stone amateur" and a "legitimate person," Mayer is revealed to be an experienced trafficker in narcotics who

intended to pursue his dealings with McElynn.*

B. The conflicting duties owed by Attorney Smith to Mayer and Rubin

Possessing evidence of a single telephone conversation which would exculpate his client, Rubin, but inculpate his former client, Mayer, Attorney Smith was in an impossible position. Owing a continuing duty of loyalty to his former client, Mayer, Smith could not take any action at the trial which would have had an adverse effect on Mayer's interest. It is widely accepted that once an attorney has represented a client in a particular matter, he cannot thereafter perform any act which would adversely affect the interest of his former client in a matter relating to the prior representation. As Judge Weinfeld stated in T.C. Theater Corp. v. Warner Bros. Pictures, Inc., 113 F.Supp. 265 (S.D.N.Y. 1953):

> "A Lawyer's duty of absolute loyalty to his client's interest does not end with his retainer.... [W]here any substantial relationship can be shown between the subject matter of a former representation and that of a subsequent adverse representation, the latter will be prohibited." 113 F.Supp. at 268.

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* Obviously the trial court did not make this distinction, since it sentenced both Mayer and Rubin to identical 18 month sentences.

See also, ABA Code of Professional Responsibility, Canons 4 and 5; Consolidated Theaters, Inc. v. Warner Bros. Circuit Management Corp., 216 F.2d 920, 924 (2d Cir. 1954); W.E. Bassett Co. v. H.C. Cook Co., 201 F.Supp. 821 (D.Conn. 1961), aff'd, 302 F.2d 268 (2d Cir. 1962); State v. Leigh, 178 Kan. 549, 289 P.2d 774 (1955).

Since any use of the statements made by Mayer and Agent McElynn in their April 17, 1972 telephone conversation would clearly have inculpated Mayer, Attorney Smith was also prevented from providing his present client, Rubin, with the independent professional judgment and undivided fidelity which mandated his introduction of all exculpatory evidence on Rubin's behalf. Canon 5 of the ABA Code requires an attorney to "exercise independent professional judgment on behalf of a client," and Ethical Consideration 5-15 to Canon 5 indicates that once a conflict of interests develops between two clients, the lawyer's duty is to withdraw from the employment of both.*

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* E.C. 5-15 states:

> "If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weight carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubts against the propriety of the representation. A lawyer should never represent in litigation multiple clients with differing interests; and there are few situations in which he would be justified in representing in litigation multiple clients with potentially differing interests. If a lawyer accepted such employment and the interests did become actually differing, he would have to withdraw from employment with likelihood of resulting hardship on the clients...." (Emphasis added).

In the words of a leading commentator on the subject of legal ethics:

> "When the interests of clients diverge and become antagonistic, their lawyer must be absolutely impartial between them, which, unless they both or all desire him to represent them both or all, usually means that he may represent none of them." Drinker, Legal Ethics 112 (1953).

Faced with this impossible situation, Attorney Smith clearly owed a duty to withdraw from any representation in the case rather than breach the duty he owed either to his present client, Rubin, or his former client, Mayer.

C. The prejudicial effect of Attorney Smith's conflicting duties on appellant Rubin's defense

Attorney Smith's inability to use the transcript to exculpate Rubin clearly deprived Rubin of his Sixth Amendment right to "the benefit of the undivided assistance of counsel." Glasser v. U.S., 315 U.S. 60, 75 (1942).

It is a widely held doctrine that a conviction must be reversed where the defendant's attorney has been prevented from effectively cross-examining a witness against his client because of an existing conflict of interest arising out of a prior or present attorney-client relationship. Thus, in Craig v. U.S., 217 F.2d

355 (6th Cir. 1954), the court reversed a conviction and ordered a new trial for a defendant whose attorney had failed to effectively cross-examine a material witness because of a prior attorney-client relationship with a co-defendant. In that case, an employer, Butzman, and his employee, Craig, were accused of criminal violations of the Internal Revenue Code involving the application for a tax refund by a company owned by Butzman. Craig's attorney, Looney, had previously represented Butzman in tax matters. Although Butzman was represented at the trial by his own attorney, Wasserman, and Craig had expected Looney to devote his efforts solely to Craig's defense, the court found that in effect Looney acted for both Butzman and Craig during the trial.

Similarly, in the instant case, although Mayer was assigned his own counsel at the start of the trial, it is clear from Attorney Smith's failure to utilize the April 17 transcript to effectively cross-examine Agent McElynn, and his failure to cross-examine Mayer at all, that Smith was in effect acting for Mayer as well as Rubin during the trial. Just as in the instant case Attorney Smith failed to effectively

cross-examine Agent McElynn on the basis of the transcript which would have inculpated Mayer, in the Craig case Looney failed to cross-examine a key prosecution witness who had incriminated Craig because of the possibility that such a cross-examination would be damaging to Butzman.

The Craig court found that "the conflict in interest on the part of Craig's counsel prevented a proper cross-examination of a material witness whose testimony especially was given considerable weight by the trial judge...." 217 F.2d at 359. In the instant case, the testimony of agent McElynn was the primary foundation of the prosecution's case against appellant Rubin, and the statements against interest by Agent McElynn contained in the transcript would have had a considerable effect on the minds of the jurors in considering the credibility of McElynn's statements as to Rubin's involvement in the alleged conspiracy. Just as the Craig court found "that such a cross-examination would in all probability have been made by counsel who had no interest in Butzman," 217 F.2d at 359, there can be no doubt that any attorney who had given his undivided assistance to Rubin's defense would have used the extremely important exculpatory evidence contained in the transcript to cross-examine Agent McElynn and Mayer.

Holding that because of the conflict of interest, Craig "did not receive the effective assistance of counsel to which he was entitled under the Sixth Amendment," the Sixth Circuit reversed Craig's conviction and ordered a new trial.

Numerous other decisions support the holding in Craig. Thus in Porter v. United States, 298 F.2d 461 (5th Cir. 1962), the Fifth Circuit ordered a hearing to determine whether a defendant convicted of a violation of the Federal narcotics laws should have a new trial because he was deprived of the undivided assistance of his counsel, and stated:

> "The Constitution insures a defendant effective representation by counsel whether the attorney is one of his own choosing or court-appointed. Such representation is lacking...where [the attorney's] full talents--as a vigorous advocate having the single aim of acquital by all means fair and honorable--are hobbled or fettered or restrained by commitments to others." 298 F.2d at 463.

Similarly, in Scott v. District of Columbia, 99 A.2d 641 (D.C. Mun. Ct. App. 1953), aff'd, 214 F.2d 860 (D.C. Cir. 1954), the court reversed a conviction and ordered a new trial where the defendant's attorney also represented the key prosecution witness:

> "...[W]e think it was impossible for the trial attorney to have given defendant the undivided and undiluted fidelity to which he was entitled.... In the tangle of conflicting interests it seems almost inevitable that the defense of [the defendant] lost that stout and unswerving loyalty which the law demands." 99 A.2d at 642.

In Morgan v. United States, 396 F.2d 110 (2d Cir. 1968), this Court ordered a hearing to determine whether a defendant convicted of conspiracy and violations of the Mann Act was deprived of his right to counsel where his attorney owed conflicting duties to a co-defendant:

> "...[T]he effective assistance of counsel is so important and paramount a right for a defendant on trial for a serious crime that we are not entitled to assume, merely because there is such substantial support for the conviction, that the defendant was, in fact, adequately represented by counsel." 396 F.2d at 115.

See also, Tucker v. United States, 235 F.2d 238 (9th Cir. 1956); Zurita v. United States, 410 F.2d 477 (7th Cir. 1969); United States v. Myers, 253 F.Supp. 55 (E.D.Pa. 1966).

The conclusion that the conflict of interest faced by Attorney Smith deprived Rubin of his right to the undivided assistance of counsel is mandated by a comparison of the facts in the instant case to those presented in Olshen v. McMann, 378 F.2d 993 (2d Cir. 1967), cert. denied,

389 U.S. 874 (1967). In the Olshen case the defendant, who had been convicted of attempted robbery, claimed in support of a petition for a writ of habeas corpus that he had been denied his right to the effective assistance of counsel because his retained trial counsel had previously represented the key prosecution witness at his trial. At the time of the trial the witness was apparently no longer in any jeopardy for his participation in the robbery, and this Court found that "there was no reason why [the witness'] former attorney should not have felt entirely free to examine him." 378 F.2d at 994.

In contrast, in the instant case, since Mayer's guilt had not yet been determined, Attorney Smith was clearly under a continuing duty not to act in a manner which would adversely affect the interests of his former client. Under these circumstances it is not difficult to understand why Attorney Smith "should not have felt entirely free to examine" Mayer or Agent McElynn about statements in their April 17, 1972 conversation which would inculpate Mayer.

This Court in the Olshen case also noted that "any inference of prejudice to [the defendant] is forcefully negated by [his attorney's] vigorous cross-

examination of [the witness] and his exhaustive attack on [the witness'] credibility." 378 F.2d at 994.

In the instant case there was no effective cross-examination of Agent McElynn, and no cross-examination of Mayer whatsoever by Attorney Smith on behalf of Rubin. Smith's failure to cross-examine either Mayer or McElynn on the basis of the statements in their April 17, 1972 telephone conversation, and his failure to make any effort to introduce those statements into evidence as exculpating Rubin, rendered Smith's representation of Rubin patently ineffective. This fact compels the finding of prejudice to appellant Rubin resulting from the conflicting duty owed by Attorney Smith to defendant Mayer. On this ground, Rubin is entitled to a reversal of his conviction and a new trial.

POINT II

THE CONDUCT OF THE TRIAL JUDGE ESTABLISHED AN ATMOSPHERE PREJUDICIAL TO RUBIN'S RIGHT TO A FAIR TRIAL

A review of the cases which attempt to define the boundaries for permissible judicial intervention during a criminal trial reveals two criteria which have been regularly considered by reviewing courts in determining whether a trial court's comments have exceeded the limits of judicial propriety. A strong showing under any one of these two criteria should be enough to warrant a reversal; it is submitted that, to a greater or lesser degree, each of these boundaries has been transgressed in the instant case.

A. Where the credibility of witnesses is a determining factor in the case, the trial court is under a duty of special care with respect to its comments.

Special care must be taken by the trial court in commenting upon the evidence where the case turns largely upon the credibility of witnesses, and where the judge's comments may have an impact upon the weight the jury will attach to a given witness' testimony. U.S. v. Nazarro 472 F. 2d 302 (2nd Cir. 1973); U.S. v. Wyatt, 442 F. 2d 858, 860 (D.C. Cir. 1971); U.S. v. Tobin, 426 F. 2d 1279, 1282 (7th Cir. 1970); U.S. v. Koenig, 300

F. 2d 377 (6th Cir. 1962). This special scrutiny is especially important in a case where the facts are close, since "there is grave possibility of prejudice to the defendants in a case such as this by error which might in other circumstances be deemed relatively minor." U.S. v. Persico, 305 F. 2d 534, 536 (2nd Cir. 1962); see also U.S. v. Grunberger, 431 F. 2d 1062, 1070 (2nd Cir. 1970).

In criticizing the conduct of the trial court in Nazzaro, supra, Judge Kaufman wrote:

> "Where the defendant's guilt or innocence rests almost exclusively on the jury's evaluation of the witnesses' demeanor and credibility, we cannot ignore questioning undertaken by a judge which so clearly signals to the jury the judge's partisanship. Even if a judge's interjections are not motivated by a partisan purpose, 'he must not ... permit even the appearance of such an interference.'" 472 F. 2d, at 310 (emphasis added).

In U.S. v. Nazzaro, supra, defendant was convicted after trial before a jury for receiving, concealing and facilitating the transportation of 8-1/2 pounds of hashish, receiving a sentence of 5 years imprisonment. In that case, as here, the critical issue for the jury was the credibility of the defendant, 472 F. 2d, at 307. The conviction was reversed on appeal because of the apparent partisanship of the trial judge.

The opinion characterized as "damaging" the trial judge's

> "persistent questioning of defense witnesses, particularly the defendant Nazzaro himself. The trial judge often assumed the prosecutor's role, interposing questions which clearly indicated disbelief in the defendant's testimony." 472 F. 2d at 308 (emphasis added)

Similarly, in U.S. v. Brandt, 196 F. 2d 653 (2nd Cir. 1952), this court, per Clark, J., reversed a conviction on the following grounds:

> "In the case at bar this mandate of judiciousness appears to have been breached on unfortunately more than a single occasion. Thus the examination of witnesses and discussions with counsel by the court were spotted with a number of remarks which were not of the form to elicit information or direct the trial procedure into proper channels, but rather to cut into the presumption of innocence to which defendants are entitled. Beyond this the court actively cross-examined several witnesses, notably the defendant Brant himself, to a quite unusual extent. This interrupted the orderly presentation of evidence by the defense. But further the questioning appeared mainly to underline inconsistencies in the positions or to elicit admissions bearing on the credibility, of defense witnesses." 196 F. 2d at 656 (emphasis added).

So also, as the excerpts from the transcript set out in the Appendix demonstrate, the trial judge in the instant case repeatedly insinuated that defendant Rubin's testimony was unworth of belief. These insinuations were

achieved through skeptical remarks underlining inconsistencies and a persistent course of questioning indicating disbelief, and were therefore wholly impermissible and prejudicial. Examples abound:

First: Rubin's sole explanation for his conduct in this case is that he was engaged in a project undertaken as a professional writer. Critical to the credibility of this defense was the establishment of Rubin's credentials as an author. Nevertheless, the trial judge on several occasions engaged in colloquies about Rubin's writing career making pointed references to the fact that certain of Rubin's works were not published (App. 58; 87; 89-90; 96). In most of these instances, the Court concluded the discussion with a rhetorical question which clearly indicated to the jury the court's disbelief of the testimony of Rubin and other defense witnesses.

Rubin testified that a number of people who had read an outline of his proposed book had told him that they would like to see the drug section of the book expanded. The Court, before the jury, then proceeded to subject the appellant Rubin to the following skeptical cross-examination:

"THE COURT: They asked you to attempt to do what?

THE WITNESS: Expand the section on drugs, the drug --

THE COURT: Expand the section, all right.

Q Will you please state to the jury --

THE COURT: What publication?

Q (Continuing) What efforts were made in this regard?

THE COURT: What kind of publication was it?

MR. SMITH: It was to be a book.

THE COURT: It was to be a book?

MR. SMITH: Yes, sir.

THE COURT: But it was not?

THE WITNESS: It was --

THE COURT: Wait a minute, wait. Was it or was it not a book?

THE WITNESS: It was a book, the contract was signed in October.

THE COURT: But it was not published?

THE WITNESS: No.

THE COURT: Some people said they wanted you to expand the section on drugs in a book that was never published?" (App. 57-58)

The not very subtle message conveyed by this series of questions, and the last remark, is unmistakable; in the Court's view Rubin's story was simply incredible. Presumably

the Court's reasoning was that since no book was ever published, the story was being made up out of whole cloth. As the trial continued, this message was to be repeatedly telegraphed to the jury.

The Court's expressions of disbelief of Rubin's explanation did not cease with Rubin's testimony. The co-defendant Mayer testified as to his understanding of Rubin's difficulty in researching his literary projects on narcotics. During this testimony the Court interrupted and made the following observations:

> "He was working on a book on sex, human sexuality, to me it was a sex book, I wasn't familiar with that name, a part of it, a section of the book, had to do with drugs, the use of drugs in combination with sex, and what happened and how --
>
> THE COURT: Well, all right, he was working on a book dealing with sex, a part of the book had to do with drugs. Very well.
>
> Q. Did there --
>
> THE COURT: Anyway, the book has never been published; isn't that right?" (App. 87)

During the government's cross-examination of Mayer, the issue of Mayer's assisting Rubin in researching the drug issue was once again developed. Once again the Court interjected and repeated the point that the book Rubin was working on had never been published, and

accordingly implied to the jury that the whole story was a fabrication:

> "A. He offered me 20 percent of the residual commissions.
>
> Q So you agreed?
>
> A Of course.
>
> THE COURT: And the book has never been published." (App. 89-90)

Second: On another occasion the trial judge cross-examined Rubin after Rubin had mentioned that he had spoken to several purported drug dealers in the course of his research, and had delivered a procaine sample to one. The court, over approximately 6 pages of transcript (Tr. 271-272; 277-281) repeatedly asked for the full names and addresses of such dealers even though Rubin had testified that they had been most wary of divulging such details. The simple repetition of the same question over and over again when the judge knew it to be unanswerable gave Rubin's testimony a flavor of fabrication which was wholly foreign to it.

Third: Further examples of improper skeptical questioning by the judge lay in his cross-examination of Rubin with respect to his familiarity with cocaine and procaine. The judge seemed to imply that, even if Rubin were a writer, who wrote about science, and who had

written about drugs, nevertheless his defense was incredible unless he had written about the particular drugs, cocaine and procaine. Thus, the court ended a series of questions respecting Rubin's conversations with a government agent by asking:

> "THE COURT: Did you ever write anything about procaine?
>
> THE WITNESS: No, but I've been well aware of procaine's use.
>
> THE COURT: You've been well aware of procaine's use?
>
> THE WITNESS: For general anesthesia.
>
> THE COURT: For general anesthesia?" (Tr. 293)

Later, where Rubin was being cross-examined about an earlier writing assignment, the judge interjected:

> "THE COURT: His answer is that he did not contact any Government agencies in connection with his research for writing a book on narcotics.
> What did you do in 1958 when you wrote that narcotics, whom did you contact then?
>
> THE WITNESS: It was just an article, I spoke to a number of medical people.
>
> THE COURT: <u>You spoke to a number of medical people, you didn't contact the Government?</u>
>
> THE WITNESS: Correct, sir.
>
> THE COURT: You wrote an article on it, right?
>
> THE WITNESS: Right.

THE COURT: Did you need further information after you wrote that article?

THE WITNESS: That was about a different subject.

THE COURT: I thought you said it was written about cocaine.

THE WITNESS: I have written an article in 1968 on some other drugs, LSD --

THE COURT: Did you write one on cocaine?

THE WITNESS: Not per se, no, I didn't.

THE COURT: Did you write anything on cocaine any time before 1971?

THE WITNESS: I think I might have written --

THE COURT: No, did you or didn't you?

THE WITNESS: I might have written a short article for some encyclopedia.

THE COURT: I want to know what you did. If you don't know, you can say you don't know.

THE WITNESS: I don't know, your Honor.

THE COURT: All right." (App. 78-79) (Emphasis added).

The unmistakable impression which arises from reading the above passages and others appearing in the transcript is the trial court's disbelief of defendant or his witnesses, to a point where, when defense testimony was not truncated on grounds of ill-conceived notions of "irrelevance" (see Point B, infra), its credibility was minimized to the jurors.

B. A trial judge's comments should not substantially diminish or disparage the significance of the defendant's defense.

The second criterion sometimes employed by the courts is that a judge's comments downgrading the significance of evidence should not effectively remove a material element of fact from the jury's consideration.

In U.S. v. Bloom, 237 F. 2d 158 (2d Cir. 1956), for example, defendants appealed from convictions for using the mails to defraud. Defendants were in the jewelry business, and were alleged to have engaged in a conspiracy to use the mails in a fraudulent "count the diamonds" prize-winning contest. The alleged fraud consisted of representing the value of "merit diamonds" as $50 when they had only cost the jewelers $4. An important issue was whether the "value" of these "merit diamonds" was to be determined on the basis of mark-up, or on the basis of sales prices of comparable goods. The trial judge admitted evidence as to the latter standard, but added:

> "It seems to me that this [the sales price] has very little bearing upon the principal issue here and that is the number of times of markup . . . but I wish to point out to you that it [the sales price] has little bearing on relevancy." 237 F.2d., at 164.

With respect to the sale price of a second ring alleged to be comparable, the trial judge stated that:

> "It has little bearing, but the jury may consider it for what it is worth." Ibid.

Later, in response to an objection by the government to evidence of sales prices, the judge stated:

> "Same ruling, that the jury will take them for what they are worth, that they have very little bearing on the issue here, which is the question of markup over cost." Ibid.

The Court of Appeals, stating that the issue was "value" rather than "markup over cost", and "notwithstanding the standard formal instruction as to the functions of judge and jury", said that "the jury must, we think, have understood the Court's remarks quoted above as directions or rulings, rather than mere comments." Ibid. Thus, where evidence had been admitted, the judge's commentary that such evidence was of little relevance was sufficient to warrant a reversal. Similarly, in U.S. v. Brandt, supra, 196 F.2d 653, it was held reversible error to call admissible evidence "totally immaterial".

In the instant case, the record is replete with instances wherein the trial judge referred to the issue of Rubin's being a writer as irrelevant (App. 49; 53; 60; 62-63; 64-65; 87-88; 91-92; 93), and on one occasion (see below) as a "red herring".

First: Appellant Rubin's counsel sought to elicit evidence from Rubin as to his literary interests in the subject of narcotics and drugs. Appellant Rubin testified that in 1972 he was attempting to conduct research on a proposed book on narcotics and human sexuality. Rubin's counsel then attempted to elicit testimony as to other drug related projects Rubin had undertaken and the following colloquy occurred in which the Court, in front of the jury, referred to the matter as a "red herring" and as being "all irrelevant":

> "THE COURT: No, this is all irrelevant, we are not going into his productions as a writer. The issue here is whether or not he was engaged in a conspiracy to sell drugs, period.
>
> MR. SMITH: That is correct.
>
> THE COURT: I am not interested in, and I am sure the jury is not interested in that, and we are not going to have a red herring cross the trail." (App. 53)

This remark of the Court was followed by a conference at the side bar in which Rubin's counsel attempted to explain that an editor, who later was to attempt to testify, requested Rubin to expand the above mentioned proposed book to include more material about drugs, and, in connection with this request, appellant Rubin had felt it

necessary to undertake first-hand research of the narcotics business (App. 53-56).

When this side bar conference concluded, the Court attempted to cure the prejudical effect of his "red herring" remark in the following manner:

> "THE COURT: I might have misled you when I spoke of a red herring across the trail. I didn't mean it in that way, I simply meant to indicate that some of this is irrelevant. I don't believe the defendants are trying to draw a red herring across the trail, that was an unhappy expression and I ask you to disregard it completely." (App. 56-57)

Whatever minimal effect, if any, this request was to have on the jury was no doubt vitiated by the many other instances where the Court reacted to testimony relating to this issue in a manner suggesting its irrelevance.

Second: Introduction of defendant's Exhibit A, an outline of his book, was met by the statement:

> THE COURT: I think you are not going to get very far [with it]. (App. 52)

Third: Later, Rubin testified about the difficulty he had in securing what he termed "real information" about drugs and drug abuse and his efforts to interview and speak to people with first-hand knowledge of the illegal drug business. (App. 59). He attempted to testify that many of these individuals were reluctant to speak to him

because of what he referred to as the "Caldwell decision", that is, because they knew he was a writer and could be compelled to divulge information concerning them (App. 59). At this point the Court labelled the motivation of these individuals as immaterial (App. 60). In so commenting, it effectively precluded Rubin from explaining to the jury that he felt it necessary to eventually pass himself off as a narcotics dealer because he couldn't get the information if drug dealers knew him to be a writer.

Fourth: Rubin, after testifying that he enlisted the assistance of co-defendant Mayer in an attempt to obtain first-hand knowledge about the drug business (Tr. 242-244), attempted to testify that he was at the same time working on a television script dealing in part with narcotics (defendant's Exhibit B). At this point the Court interjected, before the jury, as follows:

> "THE COURT: This jury's not interested in that. That is all irrelevant.
>
> I want to know what he has to say about the charge in this indictment, so does the jury, I don't care about his scripts and television --
>
> MR. SMITH: Your Honor --
>
> THE COURT: You can understand that.
>
> MR. SMITH: It is the defense point that this is a very material part.

THE COURT: Well, just ask him generally. It might be a point but that doesn't make it relevant to this issue.

MR. SMITH: This is as relating to the issue of knowing and intentional violation.

THE COURT: Well, why don't you get right down to the point and then maybe you can bring it out in a different way, but as I see it, we are going into his background and what his activities were, and I am not interested in that." (App. 62-63) (Emphasis added.)

Fifth: Later, again referring to Rubin's work, the trial Judge said:

"THE COURT: Oh, Mr. De Petris, you know I indicated to defense counsel that we aren't going into books here or treatises. It's a simple issue involved.

Now, if there is anything this witness stated that was in the book you may, of course, cross-examine him on that particular issue but you can't ask him to give this Jury a long dissertation on what's inside the book. I mean that also is irrelevant. It's taking us way off the issue here. It's very interesting but I am sure the Jury has something else to do other than staying here for a week or two listening to dissertations as to what's in any particular book. So proceed along those lines, please."(App. 85-86) (Emphasis added.)

Soon thereafter the Judge again characterized Rubin's writings as "hardly relevant to the case" (App. 86).

Sixth: This prejudicial treatment of Rubin's defense extended beyond the examination of Rubin himself. As part of Rubin's affirmative case the former managing editor of Lifestyle Magazine, Nancy Weber, was called to the stand. She testified that in March 1972 she discussed with Rubin the possibility of writing articles for that publication. She further testified that she asked Rubin to submit written proposals to the publication of any ideas ideas he may have (Tr. 483-485). According to Ms. Weber, during the second week of March, Rubin submitted a letter to her discussing several possible articles, one of which included the subject of drugs. At this point once again the Court interrupted to curtail the scope of this testimony. In doing so it clearly once again reaffirmed in the minds of the jury the Court's disbelief of Rubin's defense:

> "THE WITNESS: He had an idea for a major investigative --
>
> THE COURT: No, I do not want that, You answer questions yes or no. We are not here to get the opinions of particular witnesses. We have had the testimony that this defendant, Mr. Rubin, is a writer and you are confirming the fact that he is a writer.
>
> The issue here is not whether he is or is not a writer or writes columns.
>
> THE WITNESS: Your Honor, if I may --

THE COURT: No, you cannot do this in Court. I made that clear before.

Q Did anything come of these discussions?
A I told Mr. Rubin that even though --

THE COURT: No, I do not think we are going to permit that unless the witness is able to limit herself to a short answer.

What is the conclusion, did you hire him to write an article, or didn't you?

The conversation that you had with Mr. Rubin on writing articles for your Life Style Magazine is not particularly relevant to the issue in this case and is not an open door for further elaboration upon any editorial policies of Life Style or any columns that you wanted him to write."(App. 91-92).

Rubin's counsel also sought to solicit testimony from Mr. Robert Golddoff concerning Rubin's literary projects. Immediately after Mr. Golddoff identified himself as an author's agent, government's counsel requested a conference at the side bar (Tr. 490). As a result of this conference, Rubin's counsel made an offer of proof in the absence of the jury. Counsel explained that Mr. Golddoff would testify that he had represented Rubin as a literary agent and that he discussed with him in January 1972 a proposed book regarding in part narcotics, the outline of which is Exhibit A in evidence. The witness, had he been allowed to proceed, would also have testified,

according to Rubin's counsel, that he had requested that the part of the proposed book regarding narcotics be expanded so that it would substantially become a book concerning narcotics, including the subject of the saleability of cocaine. Of course, such testimony was relevant to establish the bona fides of Rubin's defense. Taking the position that the matter was immaterial (Tr. 494), the court ruled that it would only allow testimony to the effect that Golddoff discussed the proposed writing of the book involving drugs with Mr. Rubin and "[n]o more" (Tr. 500). After Mr. Golddoff had given his restricted testimony, he was cross-examined by government's counsel. During this cross-examination the court in the presence of the jury made the following remark:

> "Now limit your questions, please. We are not going into this book. This is an issue here as to whether these two defendants did or did not knowingly sell cocaine.
>
> Now, let's not go into these collateral issues.
>
> MR. DE PETRIS: He's attempting to show that the entire book --
>
> THE COURT: No. He asked a question which I said was proper.
>
> But you now are going into a book which I said to Mr. Smith I didn't want to waste the jury's time with." (App. 93)

Mr. Rubin's last winess was Mr. Harold Steinberg who was a principal in the publishing concern of the Chelsea House Publishers. Mr. Steinberg testified that his company and Mr. Rubin had an agreement concerning a literary project which would have included a section dealing with drugs (Tr. 522-524). During Mr. Steinberg's testimony the Court once again emphasized the point that no actual book was ever published:

> "A These are the three books we had specific agreement on. We discussed many books in the course of the several months that the defendant Rubin was dealing with Chelsea House.
> As I said, there was a section on drugs in the Dictionary Guide.
>
> THE COURT: Counter-Culture?
>
> THE WITNESS: Yes.
>
> THE COURT: That was planned, you didn't see any book on it?
>
> THE WITNESS: No.
>
> THE COURT: It was just a plan?
>
> THE WITNESS: Yes, sir.
>
> THE COURT: As a matter of fact, no book has been published by you from Mr. Rubin?" (App. 96).

The net effect of all of the above is undisputable. The Court, whether inadvertently or intentionally, repeatedly conveyed the clear message to the jury that

Rubin's defense was at best collateral and irrelevant, and at worst, simply not worthy of belief. As such, Rubin was denied the fair trial he was entitled to, and his conviction should be set aside.

C. Summary: The role of the District Judge in a Criminal Trial.

While a federal judge in a criminal trial is to be more than just a moderator of the proceeding, he may not participate in the trial to the extent or degree that he creates in the minds of the jury an impression that the defendant, or his defense to the alleged violation, is unworthy of belief. Quercia v. U.S., supra 289 U.S. 466 (1933); United States v. Salazar, 293 F.2d 442 (2d Cir. 1961). Gratuitous and deprecatory comments about the defense's case by the trial judge denies the defendant the fair and impartial trial to which he is entitled. As this Court stated in reversing a conviction in U.S. v. Nazzaro, supra:

> ". . . a judge's participation during trial - whether it takes the form of interrogating witnesses, addressing counsel, or some other conduct - must never reach the point at which it appears clear to the jury that the court believes the accused is guilty."

* * *

> "There is no dispute among the parties that the judge participated extensively in the examination of all witnesses. Several such instances, however, occurred only 'where [it was] necessary to clarify testimony and assist the jury in understanding the evidence.' But 'while it might be proper for a judge to question witnesses to clarify issues, such intervention should not become the rule.' United Statesv. D'Anna, 450 F.2d 1201, 1206 (2nd Cir. 1971). It is clear from the record that on frequent occasions during the trial of this case, the judge's questions unmistakably rehabilitated a prosecution witness whose credibility had been undermined by defense counsel. At other times, the court's questions appeared designed to inject doubt or uncertainty as to the credibility of a defense witness."472 F.2d, at 303, 307 (Emphasis added).

The prejudicial effects of a trial judge's various remarks, comments, and questions designed to engender disbelief need not necessarily be considered on an individual basis. In determining if prejudice may have influenced the jury, the judge's comments and questions may be considered cumulatively. As was said in U.S. v. Nazzaro, supra:

> "Grave errors which result in serious prejudice to a defendant cannot be ignored simply because they grow out of difficult conditions. A claim of unfair judicial conduct, under these circumstances, requires a close scrutiny of each title in the mosaic of the trial so that we can determine whether instances of improper behavior or bias, when considered individually or taken together as a whole, may have reached that point where we can make a safe judgment that the defendant was deprived of the fair trial to which he is entitled. [citing United States v. Guglielmini, 384 F.2d 602, 605 (2nd Cir. 1967)]." 472 F.2d, at 304.

As the argument above demonstrates, in this case the basic judicial standards regarding proper intervention by a trial court judge have been breached. The defendant's credibility was undermined in a case where it was without doubt the dispositive issue; no comparable judicial interrogation or comment was aimed at the prosecution or its witnesses; the court's interventions were not isolated, but recurrent, and did not result in an appreciably more orderly presentation of evidence; and finally, the skeptical and disparaging character of the judge's comments and questions concerning Rubin's defense could not have passed over the jury's collective head.

POINT III

THE COURT'S CHARGE THAT THE JURY COULD FIND THAT RUBIN CONSCIOUSLY ELECTED TO AVOID KNOWLEDGE OF THE CONTENTS OF THE SAMPLE WAS REVERSIBLE ERROR

Recognizing that the critical element in the case was whether Rubin knew that the substance delivered to the undercover agents on March 31, 1972 contained cocaine, the Court instructed the jury, over objection by counsel (Tr., at pp. 661-62), that they could find Rubin guilty if they concluded that Rubin consciously elected to avoid enlightenment as to the true nature of the substance (hereinafter the "conscious election charge"):

> "Of course one may not willfully and intentionally remain ignorant of a fact which is important and material in his conduct.
>
> The test is whether there was a conscious purpose here to avoid enlightenment." (App., at A-35).

It is respectfully submitted that in so charging the jury, the Court committed reversible error. While the charge in the abstract might constitute a correct statement of law, it had no relation to the facts proven at trial.

A. A jury charge must be confined to the facts developed by the evidence

It is axiomatic that a charge, however correct in the abstract, must be confined to the facts, not conjecture,

developed by the evidence. Morris v. United States, 326 F.2d 192 (9th Cir. 1963); Michaud v. United States, 350 F.2d 131 (10th Cir. 1965); United States v. Harman, 323 F.2d 650 (4th Cir. 1963); Velasquez v. United States, 244 F.2d 416 (10th Cir. 1957). An illustration of this principle is found in Morris v. United States, supra. In that case, the defendant was convicted of "fraud by wire" in violation of 18 U.S.C. §1343. At the trial an agent of the Federal Bureau of Investigation testified that he had arrested the defendant based on information he had that the defendant was a fugitive. Based on this testimony, the trial court instructed the jury that they could draw an adverse inference against the defendant if it felt that "flight or concealment" after the commission of a crime had been proved. Since the evidence was insufficient to support a finding of flight, the Court of Appeals reversed. It ruled that the charge did not have sufficient relation to the facts established by the evidence. In doing so, it quoted the following from United States v. Breitling, 61 U.S. 252 (20 How. 1858):

> "It is clearly error in a court to charge a jury upon a supposed or conjectural state of facts, of which no evidence has been offered. The instruction presupposes that there is some evidence before the jury which they may think sufficient to establish the facts hypothetically assumed in the opinion of the court; and if there is no evidence which they have a right to consider,

then the charge does not aid them in coming to correct conclusions, but its tendency is to embarrass and mislead them. It may induce them to indulge in conjectures, instead of weighing the testimony." 326 F.2d at 195.

Similarly, in the instant case there was a complete lack of evidence upon which the conscious election charge could have been legitimately based. The only evidence adduced at trial which went to the state of Rubin's knowledge as to the actual contents of the sample was the fact that the sample distributed by him on March 31, 1972 (Exhibit 4 in evidence) turned out to be primarily procaine (which is what he thought he was dealing with) with an unmeasurable quantity of cocaine,* and that he advised the agents, whom he thought were drug dealers, that it was cocaine. As will be demonstrated, this is not sufficient to establish that defendant Rubin consciously elected to avoid enlightenment.

B. A charge of conscious election to avoid enlightenment is only proper where the evidence shows that the defendant had reason to be aware of the alleged unknown fact

Traditionally the conscious election charge has been properly employed in cases in which the defendant had reason to

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* As to the insignificant amount of cocaine present in the sample, the government's chemist testified as follows:

"THE COURT: Yes. Now let the jury understand your testimony. The amount of procaine present was so great that it would not permit you to ascertain just the amount of cocaine present; is that your testimony?

THE WITNESS: That's correct." (Tr., at p. 48).

know of the fact of which he disclaimed knowledge. The non-narcotic cases in which the charge has been employed usually involve situations where there was a duty (for example, by reason of the defendant's employment) to know the fact. The narcotics cases, on the other hand, involve situations in which the alleged unknown fact is a matter of common knowledge to those who regularly participate in the illegal narcotics trade. In either situation, the defendant's duty, or the prevailing common knowledge, constitute sufficient reason for the defendant to inquire.

1. Non-narcotic Cases:

The leading case which sets forth the conscious election rule is Spurr v. United States, 174 U.S. 728 (1899). In that case the defendant, the president of a bank, was convicted of violating a state criminal statute which made it a crime for a bank officer to wilfully certify a check at a time when the drawer of the check had insufficient funds on deposit. The Supreme Court reversed the conviction since the evidence was not sufficient to warrant a finding that the defendant certified the checks knowing that the drawer's deposits were insufficient. In doing so, it stated that if the evidence had established that the defendant purposely avoided ascertaining the status of the drawer's accounts,

and thus violated his duty to the bank, the conviction would have been sustained:

> "The wrongful intent is the essence of the crime. If an officer certifies a cheque with the intent that the drawer shall obtain so much money out of the bank when he has none there, such officer not only certifies unlawfully, but the specific intent to violate the statute may be imputed. And so evil design may be presumed if the officer purposely keeps himself in ignorance of whether the drawer has money in the bank or not, or is grossly indifferent to his duty in respect to the ascertainment of that fact." 174 U.S. at 735 (emphasis added).

This concept of avoiding knowledge of a fact which one has a duty to be aware of is found in many of the leading non-narcotic cases following Spurr. For example, in United States v. Erie R. Co., 222 F.444 (D, N.J. 1915), the defendant railroad was indicted for the violation of the Elkins Act which made it illegal for a carrier to knowingly offer, grant or give a rebate. In accepting the argument that the government had not proved that any of the defendant's employees, and through them the defendant, had been aware of the improper rates involved, the Court stated:

> "It cannot be presumed that Congress, in framing an act so comprehensive as this, intended that a carrier, upon whom such a duty was cast, could willfully and intentionally remain ignorant of the facts necessary to determine which was the proper rate, and then shield itself from prosecution on the plea of lack of knowledge."

* * *

> "The word 'knowingly' was not construed in any other than its accepted legal meaning, but there was applied, not by way of statutory construction, a principle of law, namely, that where one upon whom a duty to know is cast intentionally or willfully keeps himself in ignorance, he will be estopped to deny knowledge of what he could have learned by reasonable inquiry and investigation. 222 F. at 450.

In reversing the conviction the Court pointed out that proof of a negligent failure to inquire is not sufficient. The defendant must actually decide to avoid knowledge. 222 F. at 450. See also, United States v. General Motors Corp., 226 F.2d 745, 749 ("'Reasonableness' of inquiry is not the proper test. Only a finding of a conscious purpose to avoid enlightenment will justify charging the defendant with knowledge." Emphasis in original).

Similarly, United States v. Wishnatzki, 7 F.Supp. 313 (S.D.N.Y. 1934), rev'd., 77 F.2d 357 (2d Cir. 1935),* was an action based upon the alleged knowing and willful filing of false claims with a railroad company in violation of 49 U.S.C.A. §10(3). There, one of the defendants relied upon the defense that he did not know that the figures which he certified were

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* This Court in Wishnatzki reversed the conviction, as it should in the instant case, on the ground that the government's evidence was insufficient to prove a "knowing" violation.

false. The District Court rejected the argument on the ground that it was his duty as an employee of the shipper to be aware of the correctness of the figures:

> "I think it is clearly established that Sroge knew, or, what is the same thing, should have known, that he was falsely certifying an account sale which was to be used in support of a claim against the railroad.
>
> It was his duty, when he was certifying such an account and using his certificate as a basis for securing a payment of money from the railroad for his employers, to know that the figures were right before he used them.
>
> Shirking inquiry, which should be made, is not a means of escaping a scienter. Knowledge thus avoided is to be attributed to the person on whom the duty of inquiry is thus placed." 7 F.Supp. at 317.

This Court's decision in United States v. Benjamin, 328 F.2d 854 (2d Cir. 1964), affirmed the defendant's conviction under the Securities Act of 1933 on the same rationale:

> "We think that in the context of §24 of the Securities Act as applied to §17(a), the Government can meet its burden by proving that a defendant deliberately closed his eyes to facts he had a duty to see." 328 F.2d at 862.

If a rule of law can be fashioned from these cases, it would appear to be that a defendant has reason to know of a fact if it is his duty under normal circumstances to be aware of the fact. The law will not allow such a defendant to excuse his otherwise criminal conduct by his conscious failure to fulfill his duty.

2. Narcotics Cases

The conscious election rule has usually been employed by the courts in narcotics cases to impute knowledge of illegal importation of heroin (as then required by 21 U.S.C. §174)* to heroin dealer defendants. The rationale was that since it was common knowledge to individuals regularly engaged in the narcotics business that heroin was not manufactured in, or legally importable into, the United States, therefore all such individuals had reason to know that heroin in their possession was illegally imported. Since the defendant had reason to know, he will not be permitted to close his eyes to the obvious.

An example of this judicial rationale is found in the case of Turner v. United States, 396 U.S. 398 (1970). That case involved a conviction under then 21 U.S.C. §174.

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* 21 U.S.C. §174, before being repealed, provided in pertinent part:

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned . . . .
>
> "Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

The defendant had been arrested in the possession of heroin and cocaine. Pursuant to the statute, the trial court instructed the jury that it could infer knowledge of unlawful importation from the defendant's unexplained possession. In the Supreme Court, the defendant argued that the use of the statutory presumption as to both the heroin and cocaine was unconstitutional since it did not have a sufficient rational basis.* The Court accepted the argument as to the cocaine counts of the indictment since it was not common knowledge that all cocaine was illegally imported. However, it affirmed on the heroin counts since it was common knowledge among drug dealers such as the defendant that heroin was not manufactured in the United States. Hence, the defendant had reason to know of the illegal importation. Since he had reason to know, he may not, in the words of the Court, practice "a studied ignorance":

> "It may be that the ordinary jury would not always know that heroin illegally circulating in this country is not manufactured here. But Turner and others who sell or distribute heroin are in a class apart. Such people have regular contact with a drug which they know cannot be legally bought or sold; their livelihood depends on its availability; some of them have actually engaged in the smuggling

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* See Leary v. United States, 395 U.S. 6 (1969), in which the Court ruled a similar presumption dealing with marijuana as being unconstitutional for lack of a rational basis.

process. The price, supply, and quality vary widely; the market fluctuates with the ability of smugglers to outwit customs and narcotics agents at home and abroad. The facts concerning heroin are available from many sources, frequently in the popular media. "Common sense" (Leary v. United States supra, at 46) tells us that those who traffic in heroin will inevitably become aware that the product they deal in is smuggled, unless they practice a studied ignorance to which they are not entitled." 396 U.S. at 416 (footnote omitted).

In support of its holding concerning the impermissable "studied ignorance," the Court cited Griego v. United States, 298 F.2d 845 (10th Cir. 1962), a case which the Court below cited to counsel in support of its conscious election charge (Tr., at p. 666)*. Griego also involved an appeal from a heroin conviction under then 21 U.S.C. §174. There the defendant, a heroin addict, on four occasions sold heroin to a government agent. His only defense was that he did not know that the heroin was illegally imported. While reversing the conviction on other grounds, the Court, citing Spurr,** nevertheless stated that the defendant, not caring whether the heroin was imported or not, could not escape punishment by claiming ignorance of illegal importation:

"[O]ne may not wilfully and intentionally remain ignorant of a fact, important and

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* The Court below also referred to the Spurr decision (Tr., at p. 667).

** The Griego Court also cited as authority United States v. Erie R.R. Co. and United States v. General Motors Corp., discussed above.

material to his conduct, and thereby escape punishment. The test is whether there was a conscious purpose to avoid enlightenment. The instant situation is comparable to that presented in Spurr v. United States...." 298 F.2d at 849.

Conversely, imputation of knowledge of illegal importation of heroin has been rejected where the defendant is not a regular user of drugs, or is not one regularly involved in the narcotics trade. United States v. Harling, 463 F.2d 923 (D.C. Cir. 1972), also involved an appeal from a conviction under 21 U.S.C. §174. There the police found heroin on the 19 year-old defendant when he had been admitted to a hospital because of an overdose. The defendant testified that he dropped in, uninvited, to a party. Once accepted, he was given drugs by others attending the party. When he was in a semi-conscious state someone injected a needle into his arm. The hospital doctor testified that the defendant did not have the multiple needle marks or hardened veins which a heroin addict would have. Reversing the conviction, the court held that it would be improper to infer knowledge of illegal importation since the evidence was that the defendant was neither a dealer nor frequent user of heroin:

"These expressions, we think, quite clearly indicate that, in the Supreme Court's view, the presumption of §174 would not be valid in cases where the Government has presented no evidence suggesting that the defendant was either a dealer in or a frequent user of, heroin. That is the case before us."

* * *

> "The record before us may, thus, be unusual, but it is nonetheless compelling. The prosecution's case is devoid of any significant indication that appellant is either a trafficker in narcotics or a frequent user thereof. The inference permitted by the presumption was essential to the Government's success. With it removed, as we think it must be here, the verdict lacks the requisite degree of evidentiary support." 463 F.2d at 926-27.

Compare, United States v. Calbro, 449 F.2d 885 (2d Cir. 1971), cert. denied, 405 U.S. 928 (1972); United States v. Martin, 428 F.2d 1140 (3d Cir.), cert. denied, 400 U.S. 960 (1970).

In short before the conscious election rule may be legitimately employed the evidence must demonstrate that the defendant had reason to know of the fact of which he disclaims knowledge. In narcotics cases the reason to know arises if the evidence shows the defendant was a frequent user of narcotics or by profession involved in the narcotics trade.

C. There is no evidence in the instant case that Rubin had reason to know the sample contained cocaine.

In the instant case there is no such evidence. Rubin was not a user of cocaine. He had no experience in the cocaine business. Indeed, it was his desire to meet individuals in that business and gain such expertise which resulted in his meeting with Agent McElynn. Rubin had no reason to know that the sample actually contained a minute quantity of cocaine. On the contrary, he had every reason

to believe it was what it was represented to him to be -- procaine and sugar. As such he had no duty to inquire further. At the very minimum, there is absolutely no evidence to suggest that he closed his eyes to the obvious. This being the fact, the conscious election charge was improper and highly prejudicial. Accordingly Rubin's conviction should be reversed.

CONCLUSION

For the foregoing reasons, the conviction of appellant Rubin should be reversed.

Respectfully submitted,

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Mark J. Lawless
Of Counsel

April 8, 1974

C 321—Affidavit of Service of Papers by Mail.
Affirmation of Service by Mail on Reverse Side.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Index No. 74-1181

UNITED STATES OF AMERICA,

Plaintiff – Appellee

against

JOSEPH RUBIN,

Defendant – Appellant

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at 36-16 24th Street, L.I.C., New York, 11106

That on April 8 *19*74 *deponent served the annexed* two copies of APPELLANTS BRIEF

on Edward Boyd, Esq. U.S. Attorney
attorney(x) for plaintiff-appellee
in this action at 225 Cadman Plaza East, Brooklyn, New York
the address designated by said attorney(x) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Sworn to before me this 8TH day of April, 1974.

Sanford L Rotter Jr.

SANFORD L. ROTTER, JR.
Notary Public, State of New York
Qualified in Queens County
Commission Expires March 30, 1975

Roy G. Nelson

The name signed must be printed beneath

ROY G. NELSON

C 321—Affirmation of Service of Papers by Mail.
Affidavit of Service By Mail on Reverse Side.

Index No.

Plaintiff

against

ATTORNEY'S AFFIRMATION OF SERVICE BY MAIL

Defendant

STATE OF NEW YORK, COUNTY OF ss.:

The undersigned, attorney at law of the State of New York affirms: that deponent is attorney(s) of record for

That on 19 *deponent served the annexed*

on
attorney(s) for
in this action at
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

The undersigned affirms the foregoing statement to be true under the penalties of perjury.

Dated

The name signed must be printed beneath

Attorney at Law